

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-5017

To be argued by
RICHARD A. WHITING

IN THE
United States Court of Appeals
For the Second Circuit

In the Matter of

PRECISION POLYMERS, INC.,
PRECISION THERMOPLASTICS CORP.,
FLO-TITE PLASTICS CORP.,
Debtors.

ROBINTECH, INCORPORATED,
SHINTECH INCORPORATED and
PLASTILINE, INC.,
Appellants,
against

PRECISION POLYMERS, INC. and
PRECISION THERMOPLASTICS CORP.,
Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANTS

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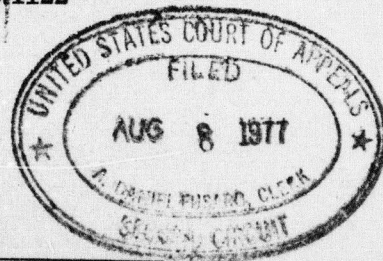


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PRECISION POLYMERS, INC. :
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FLO-TITE PLASTICS CORP., :
Debtors. :

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ROBINTech, INCORPORATED, SHINTECH : No. 77-5017
INCORPORATED and PLASTILINE, INC., :
Appellants, :
-against- :
PRECISION POLYMERS, INC. and :
PRECISION THERMOPLASTICS CORP., :
Appellees. :

- - - - - x

On Appeal from the United States
District Court for the Southern
District of New York

BRIEF FOR APPELLANTS

Preliminary Statement

The matter presented for review by this Court
arises out of an Opinion and Order issued by the Honorable
Whitman Knapp of the United States District Court for the
Southern District of New York on June 6, 1977 affirming an

Order of the Bankruptcy Court dated April 5, 1977 wherein the Bankruptcy Court approved a compromise purportedly entered into between the Appellants and the Appellees.

Issues Presented for Review

This appeal presents the question of whether the District Court erred in affirming the Order of the Bankruptcy Court dated April 5, 1977 (Joint Appendix at 360, hereinafter "JA"), approving a purported compromise ("the compromise") between the parties to the appeal herein

Specifically this Court is asked to determine:

(1) whether the Bankruptcy Court was without jurisdiction to act with respect to the compromise where a notice of appeal to the Court of Appeals had been filed from an order of the District Court dismissing a prior appeal and remanding the matter to the Bankruptcy Court;

(2) whether the filing of a supersedeas bond in connection with an appeal to the Court of Appeals stayed the Bankruptcy Court from acting with respect to the purported compromise; and

(3) whether the Bankruptcy Court gave improper notice to Creditors of Appellees of the hearing on the

settlement and, thereby, deprived creditors of an opportunity to adequately evaluate the compromise.

STATEMENT OF THE CASE
AND STATEMENTS OF FACTS

Nature of the Case, Course of
Proceedings and Disposition of
Case by District Court

On October 20, 1976, the appellees, Precision Polymers, Inc. ("Precision") and Precision Thermoplastics Corp. ("Thermoplastics") filed petitions in the Southern District of New York for relief pursuant to the provisions of Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 1 et seq. Those proceedings were assigned to the Honorable John J. Galgay, Bankruptcy Judge, and were consolidated. Appellants Robintech, Incorporated ("Robintech"), Shintech, Incorporated ("Shintech") and Plastiline, Inc. ("Plastiline") filed proofs of claim as unsecured creditors in those proceedings, and thereafter, by Order to Show Cause dated November 24, 1976 (JA-), sought to have the bankruptcy proceedings dismissed or, in the alternative, transferred to the District Court of New Jersey on the ground that the Chapter XI petitions had been improperly filed in the Southern District of New York, where no basis for venue existed.

Appellees, prior to the filing of their Chapter XI petitions, commenced, on April 15, 1976, an antitrust action against appellants. This action, case number 76 Civ. 1746, was referred to the Honorable Whitman Knapp, United States District Judge.

During the pendency of the aforementioned motion to dismiss or transfer the Chapter XI proceedings, negotiations were held in chambers before Judge Galgay and at his behest on December 14, 1976, in order to see if a compromise of the various disputes between the parties herein could be worked out. As a result of those negotiations, a tentative offer was made by the Appellants to settle the disputes. Judge Galgay then convened the parties and made a Statement for the Record (JA-78) wherein he outlined certain of the terms of the tentative offer of compromise:

"The present posture of the matter is that the three moving creditors who are Defendants in the anti-trust suit aforementioned, appear willing to pay \$250,000 in exchange for the dismissal of the anti-trust law suit with prejudice.

"The terms of payment proposed by the three moving Defendants, is the payment of \$100,000 when the Order of Dismissal and the withdrawal of the challenge to the venue is signed and when such dismissal Order becomes final and non-appealable; and thereafter at thirty day intervals \$50,000 will be paid on each such date." (JA-81)

The next day, counsel to Appellants were instructed to withdraw the offer, and Judge Galgay and the Appellees immediately were so advised. Thereafter, on December 28, 1976, the Debtors-Appellees obtained an Order to Show Cause, signed by Judge Galgay, returnable January 5, 1977. (JA-86) Pursuant to the Order to Show Cause, a hearing was scheduled to determine whether an order should be entered authorizing the acceptance by the Appellees of the purported compromise.

On January 5, 1977, the return date for the order to Show Cause, Judge Galgay refused to conduct proceedings to authorize the compromise because, in his opinion, there was no settlement agreement before him. Judge Galgay stated:

"In any event, if there were a settlement entered into, that settlement has been withdrawn, so I find nothing before me, and I am not going to order the relief requested." (JA-133)

"My problem is that there is no offer of settlement before me. It has been withdrawn if there was one." (JA-137)

Judge Galgay "so ordered" his refusal to conduct proceedings to approve the compromise. (JA-140)

Thereafter, Precision and Thermoplastics (a) appealed from Judge Galgay's refusal to conduct proceedings to authorize the settlement, and (b) simultaneously filed a motion for summary judgment in the anti-trust action to enforce the purported settlement. The Appeal and the motion for summary judgment came on for hearing simultaneously before the Honorable Whitman Knapp, District Judge, on February 4, 1977.

On March 18, 1977, Judge Knapp filed a Memorandum and Order determining the issues before him. (JA-154) Judge Knapp held that an enforceable contract of settlement had been entered into by the parties, and granted, in part, the motion of Precision and Thermoplastics for summary judgment.¹ Judge Knapp further decided that the appeal from Judge Galgay's order refusing to conduct proceedings to authorize the compromise was dismissed as moot and he remanded the bankruptcy proceedings to Judge Galgay. (JA-155)

On March 25, 1977, Appellants filed a notice of appeal (JA-157) to the United States Court of Appeals for

¹ The grant of summary judgment in favor of Precision and Thermoplastics, together with the judgment entered against Robintech, Shintech and Plastiline, are the subject matter of an appeal pending before this Court (No. 77-7339) and scheduled for oral argument on the same day as the instant appeal.

the Second Circuit from the aforementioned Memorandum and Order of Judge Knapp. On April 4, 1977, the appeal was docketed with the Court of Appeals and a supersedeas bond in the amount of \$277,750.00 was filed.² (JA-357)

On March 28 and March 31, 1977, hearings were held before Judge Galgay with respect to various matters pending in the Bankruptcy proceedings including authorization of the settlement pursuant to the remand. Thereafter, on April 5, 1977, Judge Galgay entered an order authorizing the debtors to accept the compromise. (JA-360)

Appellants immediately thereafter filed a notice of appeal to the United States District Court for the Southern District of New York from the Order of the Bankruptcy Court approving the compromise. (JA-363) The appeal was argued before the Honorable Whitman Knapp on May 3, 1977. Subsequently, on June 6, 1977, Judge Knapp issued an opinion and order (JA-366) affirming the Order of the Bankruptcy Court approving the compromise.

It is from that opinion and order affirming the Bankruptcy Court's approval of the compromise that the appellants herein appeal.

² The notice of appeal and the supersedeas bond were subsequently withdrawn by Stipulation dated May 3, 1977. (JA-364)

ARGUMENT

- I. THE DISTRICT COURT ERRED IN AFFIRMING THE ORDER OF THE BANKRUPTCY COURT WHERE THE BANKRUPTCY COURT, AT THE TIME IT ACTED, WAS WITHOUT POWER TO DO SO.
-

- A. The Notice of Appeal Filed by Appellants on March 25, 1977 Divested the Bankruptcy Court of Jurisdiction to Approve the Compromise.

The filing of a notice of appeal to the Court of Appeals has the effect of vesting in the Court of Appeals all jurisdiction of the matter appealed from and also of divesting the lower courts of all jurisdiction to take any action thereon, except insofar as jurisdiction in aid of the appeal is expressly reserved in the District Court by statute or the Federal Rules of Civil Procedure or where the lower court is acting under the mandate of the Court of Appeals. In Re Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1955); Chrysler Corp. v. Lakeshore Commercial Finance Corp., 66 F.R.D. 607 (E.D.Wisc. 1975).

This rule has been followed widely:

In Rogers v. Consolidated Rock Products Co., 114 F.2d 108 (9th Cir. 1940), the Court of Appeals affirmed a dismissal by the District Court for want of jurisdiction to

hear a proposal to modify a plan of reorganization. The order confirming the plan of reorganization had already been appealed to the Court of Appeals when the proposal came on to be heard before the District Court. In holding that the District Court correctly decided that it had no jurisdiction to hear the proposed modification because of the pending appeal, the court stated:

Obviously, the matter of confirmation could not be before both the appellate and the inferior court at the same time 114 F.2d at 111.

In Diamond Laundry Corp. v. California Employment Stabilization Commission, 162 F.2d 398 (9th Cir. 1947), the Court of Appeals held that the District Court had no jurisdiction to entertain additional and supplemental objections to claims after a notice of appeal to the Court of Appeals had been filed with respect to the allowance of those claims:

So far as the claims were concerned, jurisdiction of the proceeding had passed from the District Court to this Court [i.e., the Court of Appeals]. Hence, the District Court had no jurisdiction to entertain the additional and supplemental claims. 162 F.2d at 402.

Where a District Court entered a judgment and a notice of appeal was filed therefrom, the District Court

lacked jurisdiction to grant injunctive relief in support of its judgment. J.J. Theaters, Inc. v. Twentieth Century-Fox Film Corp., 112 F. Supp. 674 (S.D.N.Y. 1953).

An order of an Illinois District Court denying a motion to vacate a dismissal and denying leave to amend the complaint was declared void and reversed, although the motion had been filed prior to the filing of a notice of appeal because the order was entered after the notice of appeal from the order of dismissal had been filed. Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303 (7th Cir. 1956).

Applying the above stated rule to the instant case, upon the filing of a notice of appeal by Appellants on March 25, 1977, the Court of Appeals for the Second Circuit was vested with jurisdiction with respect to all aspects of Memorandum and Order appealed from, and certainly with respect to the dismissal and remand aspects of it. No inferior court could act with respect thereto unless jurisdiction was expressly reserved in it in aid of the appeal or unless it was acting under a mandate of the Court of Appeals. The approval of the compromise by the Bankruptcy Court does not come under either of these exceptions.

In the instant case, Appellants filed a notice of appeal on March 25, 1977 (JA-157) from the memorandum and Opinion issued by the Honorable Whitman Knapp on March 18, 1977 (JA-154). The Court of Appeals for the Second Circuit was thereby vested with exclusive jurisdiction over the subject matter of the said Memorandum and Order upon the filing of the said notice of appeal.

In its opinion of June 6, 1977 (JA-366) affirming the order of the Bankruptcy Court, the District Court stated "... the appellants filed their notice of appeal only in the civil case before us, 76 Civ 1746, not from our simultaneous remand of the bankruptcy case to Judge Galgay." (JA-367). This finding was manifestly incorrect:

First, the notice of appeal contained the captions of both the civil case and bankruptcy case before the District Court. (JA-157)

Second, the language of the notice of appeal clearly indicates that it was Appellant's intent to appeal from all aspects of the Memorandum and Order of March 18, 1977.

Third, although it was the intent of Appellants to appeal from all aspects of the said memorandum and Order, the clerk's office of the United States District Court for

the Southern District of New York failed to enter the notice of appeal on the docket of the civil case; however, the notice of appeal was duly docketed in the bankruptcy case docket. (JA-2) Thus, in any case, the appeal relative to the bankruptcy case aspects of the Memorandum and Order of March 18, 1977 was pending before the United States Court of Appeals for the Second Circuit on April 5, 1977, the date the Bankruptcy Court entered its Order approving the purported compromise. The finding of the District Court that the notice of appeal was not filed with respect to the dismissal and remand aspects of the Memorandum and Order is clearly erroneous.

As a notice of appeal was in fact filed with respect to the bankruptcy aspects of the Memorandum and Order, it must follow that, at the very least, jurisdiction over that subject matter was vested exclusively with the Court of Appeals for the Second Circuit: until that matter was decided by the Court of Appeals or disposed of in another way, the Bankruptcy Court was without jurisdiction to approve the compromise purportedly entered into by the parties to this appeal.

As it was divested of jurisdiction, by virtue of the appeal then pending in the Court of Appeals with respect to at least the bankruptcy aspects of the purported compro-

mise, the Bankruptcy Court did not have power to approve the alleged compromise. The Order of the Bankruptcy Court of April 5, 1977 therefore is a nullity, and the affirmance thereof is clearly erroneous.

B. Even if the Bankruptcy Court Had Jurisdiction to Approve the Compromise, It Was Stayed from Doing So by Virtue of the Supersedeas Bond Filed by Appellants.

In connection with their appeal from the Memorandum and Order of the District Court, Appellants filed a supersedeas bond with the United States District Court for the Southern District of New York in the amount of \$277,-750.00 on April 4, 1977. (JA-357) The bond was approved as to form and sufficiency by the Clerk of the District Court at the time it was filed. (JA-359)

The effect of the filing of the supersedeas bond was to stay proceedings in the lower courts pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, which states:

"When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allow-

ing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the Court."

The exceptions contained in subdivision (a) of Rule 62 are inapposite herein. Accordingly, upon approval of the supersedeas bond, the Appellants obtained a stay effective against all lower tribunals.

Before Judge Galgay signed the Finding of Facts, Conclusions of Law and Order which purported to approve the settlement, he was advised of the filing of the supersedeas bond and was shown a copy thereof. Despite the existence of this bond and the stay arising therefrom, the order approving the compromise was signed. This constituted error on the part of the Bankruptcy Court.

The effect of filing a supersedeas bond was considered in In re Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1955). The court stated:

"Thus on a timely application for the supersedeas, the function of the Court is limited to a determination whether the conditions of the bond conform to the requirement . . . and whether the sureties thereon are adequate, - it may approve or disapprove the bond. But if it approves, the stay follows automatically under the last sentence of Rule 62(d), and the Court has no discretion in the matter. 227 F.2d at 655.

The court further stated:

"When the supersedeas becomes effective, the appellant obtains thereby a valuable right to have the status quo preserved until his appeal is heard and decided." 227 F.2d at 655.

Despite the filing of the supersedeas bond and the stay arising therefrom, the Appellees applied to the Bankruptcy Court for settlement of an order approving the compromise. When the Bankruptcy Court approved the compromise, in violation of the stay, the Appellants lost their valuable right to have the status quo preserved pending determination of their appeal by the Court of Appeals, thus defeating one of the purposes of filing the costly supersedeas bond.

II. THE DISTRICT COURT ERRED IN AFFIRMING THE BANKRUPTCY COURT'S APPROVAL OF THE COMPROMISE BECAUSE OF THE BANKRUPTCY COURT'S FAILURE TO GIVE PROPER NOTICE TO CREDITORS, THUS DEPRIVING CREDITORS OF AN ADEQUATE OPPORTUNITY TO EVALUATE THE COMPROMISE.

Pursuant to Rule 203(f) of the Rules of Bankruptcy Procedure, Notice of the hearing to approve the compromise was served on the eleven members of the Creditors' Committee and its attorney. Of the balance of some 700 creditors, the only others given notice of the said hearing were Appel-

lants. In view of the interests of all the creditors with respect to the compromise and inadequate representation of the creditors-at-large provided by this Creditors' Committee, it was error for the Bankruptcy Court to approve the limited notice to creditors of the hearing on the approval of the compromise. Despite the provisions of Rule 203(f) of the Rules of Bankruptcy Procedure, notice to all creditors should have been mandated in this case.

This Committee acted without full knowledge of the facts when it approved the purported compromise. On December 27, 1976, the Committee indicated informal approval of the compromise (with certain reservations). At the hearing on March 28, 1977, counsel to Precision and Thermoplastics stated to the Bankruptcy Court that the Committee unanimously approved the compromise. (JA-250) This approval was made by the Creditors' Committee despite the fact that the debtors had filed their petitions on October 20, 1976 and failed to file schedules or operating statements until March 25, 1977. The operating statements covered the period of October 20, 1976 to March 3, 1977, indicating the debtors had lost approximately \$900,000 during that period. At the March 28, 1977 hearing, the attorney for the Committee stated that the Committee had no idea of the magnitude of the debtor's losses. (JA-174) Therefore, the Committee

approved the compromise without any knowledge concerning the operations of the debtors and took no further steps to reconsider their approval: It is noteworthy that for five months during which the bankruptcy proceedings were pending without schedules or operating statements being filed with the Court, the court never was orally informed as to the Debtors' operations.

Failure to properly monitor the proceedings also is evidenced in the failure of members of counsel to the Creditors' Committee to attend a number of hearings during the pendency of the Chapter XI proceedings.

Furthermore, the Committee approved the compromise without making a thorough assessment of the debtors' chances of success in the antitrust suit. Mr. Benenson, the attorney for the Creditors' Committee, stated in open court:

"At the time the appeals were going, everything was swirling around and actually, no independent analysis of the anti-trust suit has been made.
(JA-270)

The lackadaisical attitude of the Creditors' Committee is evidenced by its failure to press for operating statements and schedules, by its inattentiveness to the proceedings and by its failure to carefully assess the anti-trust suit. All these clearly demonstrate that it did

not adequately represent the interests of all creditors and that its recommendation had, at best, a flimsy basis. Therefore, the Bankruptcy Court abused its discretion in dispensing with notice to all creditors as permitted by Rule 203(f) and providing instead that notice to the Creditors' Committee of the approval of such a compromise be deemed adequate. All creditors should have been notified.

Assuming, arguendo, that notice to the Creditors' Committee above was proper: not having the full facts before it, it was not possible for the committee to properly appraise the terms of the compromise and advise the Court. Counsel for the Appellants requested an adjournment of the hearing to approve the compromise in order to insure that the creditors were fully apprised of changed circumstances (i.e., the operating statements filed after the Creditors' Committee approved the compromise showed inordinate losses), but this request was denied by the Bankruptcy Court. (JA-309) 'This denial constituted an abuse of discretion by the Bankruptcy Court.

In view of the foregoing, the Bankruptcy Court should not have approved the compromise without giving notice to all creditors and allowing adequate time for them to consider the entire factual situation and assimilate and evaluate the facts. Its failure to do this constituted an

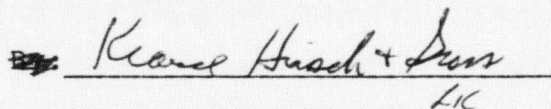
abuse of discretion as did the Bankruptcy Court's reliance upon the advice of an uninformed and uninterested Creditors' Committee. The District Court erred in affirming the order of the Bankruptcy Court approving the compromise in view of these circumstances.

CONCLUSION

For the foregoing reasons, the judgment entered by the District Court should be reversed, and the approval by the Bankruptcy Court of the purported compromise should be vacated.

Respectfully submitted,

KRAUSE, HIRSCH & GROSS

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LIC

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STATE OF NEW YORK
COUNTY OF NEW YORK:

SAM SCHNEIDER, being duly sworn deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 139-15 88th Road, Jamaica, SS New York 11435. That on the 8th day of August, 1977, at 25 West 43rd Street, New York City, deponent served

two (2) true copies of the within Brief of Appellant upon Bernard Rackear, P.C., the attorney for the Appellees herein; by leaving a copy thereof at his office with Leslie Handler, a secretary of said office.

Sam Schneider

Sworn to before me this

8th day of August, 1977

Mark Fidler

MARK FIDLER
Notary Public, State of New York
No. 31-4636381
Qualified in New York County
Commission Expires March 30, 1978

COPY RECEIVED

Date 8/8/77 19.....

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